

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ROBERT NOVAK d/b/a PetsWarehouse.com,

Plaintiff,

-against-

ACTIVE WINDOW PRODUCTIONS, INC.,
MARK ROSENSTEIN, CYNTHIA S. POWERS,
DAN RESLER, JARED WEINBERGER,
THOMAS BARR, "JOHN DOE" and "MARY DOE",

Defendants
-----X

Notice of Motion
and Motion

01 CV 3566

(DRH)(WDW)

PLEASE TAKE NOTICE, that upon the Summons and Complaint, the Amended Complaint, the Answer, the affirmation of Cynthia A. Kouril dated August 13, 2009, and the exhibits attached thereto, and upon all of the other papers proceedings and prior orders heretofore had in this action, Defendants ACTIVE WINDOW PRODUCTIONS, INC. and MARK ROSENSTEIN, by and through its undersigned counsel, will move this honorable Court before the Honorable William D. Wall, United States Magistrate Judge at the Federal Courthouse, 100 Federal Plaza, Central Islip, New York 11722 on the 14th day of September, at 11 o'clock in the forenoon of that day or as soon thereafter as the parties may be heard for an Order sanctioning Mr. Novak as follows:

1. Sanctioning plaintiff via issue preclusion for willful failure to produce discovery.

2. Sanctioning Plaintiff via a conditional order of dismissal of Plaintiff's Complaint, unless Plaintiff produces all outstanding discovery within 14 days and submits to deposition with 7 days after that.
3. Authorizing the defense to move the court for costs and attorney's fees.

AND DEFENDANT FURTHER MOVE, that the Court issue a Report and Recommendation to the District Court Judge recommending:

1. The dismissal of this action as a sanction for failing to cooperate in discovery and for willfully dilatory and contumacious conduct as well as repeated and flagrant violations of this Court's order and the Federal Rules of Civil Procedure.

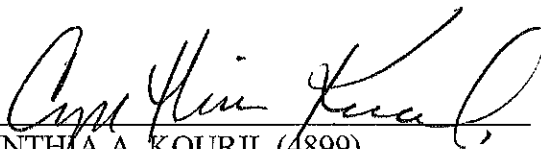
or

Alternatively, should this court find that plaintiff's conduct is not willful, and Order precluding plaintiff from offering into evidence at trial in defense of motion for Summary Judgment any of the information which plaintiff failed to disclose.

Pursuant to Rule 6 (d) and (e) of the Federal Rules of Civil Procedure, opposing affidavits, if any, must be served upon the undersigned and filed with the Court

no later than one day prior to the hearing date of this motion or not less than four days prior if served by mail.

Dated: August 13, 2009
Melville, New York


CYNTHIA A. KOURIL (4899)
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